GAR Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards - Third Edition

Grounds to Refuse Enforcement

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Enforcement used to be a non-issue in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly, and challenges to awards have become the norm.

The *Challenging and Enforcing Arbitration Awards Guide* is a comprehensive volume that addresses this new reality. It offers practical know-how on both sides of the coin: challenging and enforcing awards. Part I provides a full thematic overview, while Part II delves into the specifics seat by seat, now covering 29 jurisdictions.

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Grounds to Refuse Enforcement

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Summary

INTRODUCTION

Article V is one of the most central provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention (NYC)). It lists the grounds based on which courts may refuse recognition and enforcement of a foreign arbitral award. As such, it constitutes an exception to the obligation of courts to enforce foreign arbitral awards contained in Article III of the NYC.[2]

In short, the grounds for refusal are:

- according to Article V(1) of the NYC:
    - incapacity of the parties or invalidity of the arbitration agreement;
    - violation of due process rules;
    - differences not falling within the terms of, or decisions on matters beyond the scope of, the submission to arbitration;
    - improper composition of the arbitral authority or non-respect of arbitral procedure; and
    - award not yet binding, set aside or suspended; and
- according to Article V(2):
    - differences that cannot be settled by arbitration; and
    - violation of public policy.

The canons of interpretation for Article V of the NYC, derived from the text, context, purpose and drafting history as well as the application of the Convention by courts, may be summarised as follows:

- the grounds for refusal contained in Article V of the NYC are exhaustive;
- courts may not review the award on its merits;
- the burden of proof for the existence of a ground for refusal (generally) rests on the defendant and this onus is heavy;
- courts must interpret the grounds for refusal under Article V narrowly;
- courts ought to refuse the enforcement only in serious cases; and
- a pro-enforcement attitude.[3]

The exhaustive character of the grounds for refusal listed in Article V of the NYC – which follows from the words 'only if' employed in Article V(1)[4] – means that domestic law may not provide for additional grounds of refusal.[5] The principle of no review of the merits is firmly established by the case law of enforcement courts. A review would be incompatible with the purpose of arbitral tribunals.[6] Since Article III of the NYC creates a presumption of validity of the award, the burden of proof incumbent on the defendant is heavy.[7]

Whereas the grounds for refusal contained in Article V(1) have to be examined by the enforcement court, only 'at the request of' the party resisting enforcement, the grounds for refusal contained in Article V(2) have to be examined by the court ***ex officio*** (on its

own initiative).[8] The narrow interpretation of the grounds for refusal follows from the general purpose of the NYC to promote the enforcement of foreign arbitral awards and the corresponding obligation undertaken by contracting states in Article III.[9]

The NYC does not contain any explicit rules on preclusion or waiver. However, it is generally accepted that, under certain circumstances, a party may be precluded from relying on refusal grounds if those grounds have not been raised in a timely manner in the arbitration proceedings or in the proceedings for the setting aside of final awards (legal doctrines of estoppel, prohibition of contradictory behaviour or good faith).[10] In addition, the parties may agree not to object to the enforcement of the award or at least not to raise certain grounds for refusal (waiver).[11]

Finally, it remains disputed both in legal practice and scholarship whether enforcement courts have discretion under Article V of the NYC to refuse enforcement of a foreign arbitral award if one of the refusal grounds listed therein is fulfilled.[12] This has to do with the language used in Article V. Whereas the Spanish, Russian, Chinese and English treaty texts use the word 'may', the French text, according to some readers, employs a formulation equivalent to 'shall'.[13] Yet, domestic legislatures and enforcement courts in many jurisdictions have interpreted Article V in favour of residual discretion.[14]

GROUNDS FOR REFUSAL UNDER ARTICLE V(1) OF THE NYC

INVALIDITY OF ARBITRATION AGREEMENT (ARTICLE V(1)(A))

PARTIES TO ARBITRATION AGREEMENT UNDER SOME INCAPACITY

The first sentence of Article V(1)(a) provides that the enforcement of an award may be refused if 'the parties to the agreement were, under the law applicable to them, under some incapacity'.

Despite the wording of this sentence, it is sufficient that one of the parties was under some incapacity at the time of the execution of the arbitration agreement[15] to refuse the enforcement of an award.[16]

The NYC does not define the notion of capacity or incapacity, which can be interpreted differently by different jurisdictions. Article V(1) of the NYC states that the capacity of a party must be determined 'under the law applicable to them' without indicating the applicable conflict of laws rule. Accordingly, the applicable law is often determined by the conflict of law rules of the place where the recognition or enforcement of the award is sought (for natural persons, usually the place of their nationality or domicile, and for legal entities, the place of the seat or incorporation of the legal entity).[17]

Generally, the capacity according to the first sentence of Article V(1)(a) includes the capacity to act, to sue or be sued, and to conduct proceedings, as well as the representation of the parties.[18]

The question of incapacity often arises in connection with the recognition and enforcement of awards against a state or a state-controlled entity, since some domestic laws prohibit or limit the possibility for state-owned or state-controlled entities to enter into arbitration agreements.[19] This defence is often refused, however, as it is regarded as contradictory or an abuse of rights.[20]

ARBITRATION AGREEMENT IS NOT VALID

Article V(1)(a) of the NYC provides that the enforcement of an arbitral award may be refused if the agreement 'is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made'.

In practice, parties have rarely been successful in opposing the recognition and enforcement of an arbitral award on the ground that the arbitration agreement was invalid.[21]

Considering the wording of the Article, the NYC does not refer to the conflict of law rules but directly to the applicable substantive laws. It is accepted that Article V(1)(a) supersedes any conflict of law rules.[22] The choice of law is thus first determined by the will of the parties, which may be explicit or implicit.[23] If the parties made a choice of law for their main contract containing the arbitration agreement, it is usually understood that the choice also applies to the arbitration agreement.[24] Absent the parties' choice, the validity will be determined 'under the law of the country where the award was made' (i.e., according to the leading authors the law of the seat of arbitration).[25]

The party resisting enforcement may invoke both formal and substantive flaws of the arbitration agreement.[26] The enforcement courts have the power to review, in an independent analysis, the validity of the arbitration agreement. The formal arguments include the failure to comply with the form requirements of Article II NYC. Courts generally accept, however, that even if the arbitration agreement fails to meet the form requirements of Article II NYC, enforcement may be ordered if the agreement complies with the more favourable rules of the jurisdiction where enforcement is requested (most-favourable right, Article VII NYC).[27] The substantive arguments include defects affecting the valid conclusion of the arbitration agreement, for example for lack of consent or lack of representation.[28]

VIOLATION OF DUE PROCESS (ARTICLE V(1)(B))

Pursuant to Article V(1)(b) of the NYC, enforcement may be refused if a party was 'not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case'. This Article addresses the violation of due process in arbitral proceedings and is directed at ensuring that the arbitration proceedings have been properly conducted and that the parties have had an adequate and fair opportunity to defend their case.[29]

Article V(1)(b) is often raised by parties opposing recognition and enforcement of an award, although most of them are unsuccessful with this argument.[30]

The NYC does not specify which law is applicable to the principle of due process. The interpretation of this principle is not uniform across the contracting states to the NYC, which apply different standards while taking into account the international character of the arbitration process.[31] Often, the enforcement courts consider that the violation of due process is to be assessed under the law of the country in which recognition or enforcement is sought.[32]

Article V(1)(b) first refers to the 'proper notice' of the appointment of the arbitrator or of the arbitration proceedings. The NYC is silent on what the proper notice should include and the required form thereof and has thus left this notion up to the interpretation of the enforcement courts.[33] With respect to the notice of the arbitration proceedings, the general view is that the respondent must be notified of the existence and of all the essential steps[34] of the arbitration proceedings, such as its commencement (including the requests for the

appointment of arbitrators, the appointment itself and the confirmation of the appointment), the issues in dispute, the hearings, etc.[35]

Article V(1)(b) further provides that a court may refuse the recognition or enforcement of an award if a party proves that it was unable to present its case. This notion should be interpreted broadly and means that the parties should have had the opportunity to present their case and to be heard regarding the alleged facts, claims, defences and merits. In this context, the courts respect the flexibility of arbitration proceedings and the wide discretion vested in arbitral tribunals to organise and control the proceedings,[36] in particular with respect to evidentiary rulings.

The enforcement courts will refuse the enforcement of an arbitral award only if the requesting party proves that there is a causal nexus between the violation and the outcome of the arbitration.[37]

A general and unlimited waiver of minimal due process prior to the arbitration proceedings is inadmissible. That said, it is often the case that the parties agree, whether expressly or by their behaviour, to waive to some extent, during the arbitration proceedings, the violation of due process. In particular, a party may not raise the violation of due process if it did not object to the same violation during the course of the arbitration or after, notably through a request to set aside the award.[38]

DECISION BEYOND THE SUBMISSION TO ARBITRATION (ARTICLE V(1)(C))

According to Article V(1)(c), enforcement can be denied if '[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration'.

Contrary to Article V(1)(a), the opposing party here acknowledges that the arbitral tribunal had jurisdiction to decide on the case but considers that the award went beyond the scope of the arbitration.[39]

The role of the enforcement court is not to review the merits of the case but only to determine whether the invoked difference was outside the personal (i.e., for instance an award against a third party not bound by the arbitration agreement), temporal or material scope of the arbitration (***extra potestatem***).[40]

There is some controversy as to whether Article V(1)(c) also applies to awards that granted a party more than or something different from what it requested in its prayers for relief (i.e., ***ultra petita*** or ***extra petita***).[41] Although some consider that the principle of ***ne ultra petita*** is a ground for refusing to enforce an award,[42] others consider that the courts must only examine whether the award exceeds the scope of the arbitration agreement, regardless of the parties' pleadings and prayers for relief.[43]

The second part of Article V(1)(c) provides that the award should be partially enforced if matters within the scope of the arbitration agreement can be separated from those that went beyond the admissible scope. This is in line with the general purpose of the NYC to facilitate the enforcement of arbitral awards.[44]

The NYC, once again, does not specify which law is applicable when examining whether the arbitrators went beyond the scope of the arbitration agreement. Leading authors consider that the enforcement courts should refer to the law applicable to the validity of the arbitration agreement (Article V(1)(a)).[45]

As with the other jurisdictional objections, a party may be barred from raising the defence of Article V(1)(c) of the NYC if it took part in the arbitration proceedings and did not object in due course to the jurisdiction or competence of the arbitral tribunal.[46]

COMPOSITION OF ARBITRAL TRIBUNAL OR ARBITRAL PROCEDURE NOT IN ACCORDANCE WITH PARTIES' AGREEMENT OR LAW OF THE SEAT OF ARBITRATION (ARTICLE V(1)(D))

According to Article V(1)(d), the enforcement can be denied if the 'composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'.

The notion of agreement is not limited to the arbitration agreement but also encompasses any agreement, whether express or implied, oral or written,[47] between the parties concerning the composition of the arbitral tribunal or the arbitration procedure.[48]

The composition of the arbitral tribunal encompasses the number of arbitrators, the appointment authority and the requirements stipulated by the parties, such as the qualifications of the arbitrators or the time limit for rendering an arbitral award.[49] Some authors consider that the enforcement of an award may also be refused in the event of an arbitrator's bias.[50]

The parties are free to determine the arbitration procedure and the applicable rules to appoint the arbitrators. They may select national rules, agree on their own independent rules or opt for institutional rules.[51] According to some authors, the parties can even exclude mandatory provisions of the law of the place of arbitration[52] (with the exception of fundamental rules or violation of public policy[53]). The law of the country where the arbitration took place (usually the seat of arbitration) plays only a subsidiary role, in case there is no agreement between the parties.[54] In this context, the broad discretion of the arbitral tribunal to organise the proceedings should be taken into consideration. Consequently, Article V(1)(d) should only apply restrictively.[55]

With respect to the arbitration procedure, Article V(1)(d) does not mention what types of irregularities could trigger a court to refuse the enforcement of an award, but they can include the formal pre-arbitration proceedings, the settlement in one stage of arbitration proceedings, the choice of law, seat or language, the timeline and the oral hearing, among other things.[56] Any irregularity, however, must be substantial and in a causal nexus with the award.[57]

A party that did not object to the alleged breach during the arbitration proceedings is considered to have waived the right to rely on Article V(1)(d).[58]

AWARD NOT YET BINDING, SET ASIDE OR SUSPENDED (ARTICLE V(1)(E))

According to Article V(1)(e), the enforcement can be denied if the 'award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'.

This provision encompasses three situations, as described below.

AWARD NOT YET BINDING

'Binding' is not defined by the NYC and has given rise to numerous discussions among legal authors. Depending on the courts, the notion is to be interpreted in accordance with the agreement of the parties, in accordance with the ***lex arbitri***,[59] or through an autonomous approach, where the courts relied on their own interpretation.[60]

In any case, the binding nature of an award does not depend on the enforceability of the award in the country where it was made as the NYC eliminated the double ***exequatur*** requirement.[61] The binding nature does not mean either that there are no pending actions to set aside the award as it is only if an award has been set aside that the second option under Article V(1)(e) applies (see below).[62]

It is also disputed whether interim or partial awards should be considered binding within the meaning of Article V(1)(e), with courts applying different standards (such as whether the award includes the settlement of a claim on the merits, whether it is possible to revise the award, etc.).[63]

The NYC transferred the burden of proof from the party requesting the enforcement of the award to the opposing party. 'It is indeed the party opposing the enforcement of the award which bears the burden to prove that the award is not binding.'[64]

AWARD SET ASIDE

The second alternative is when the award had become binding but was set aside subsequently by the courts of the country in which, or under the law of which, the award was rendered.[65] [66], As mentioned above, the existence of proceedings to set aside the award is not sufficient to refuse the enforcement of the award. This triggers many questions as the NYC does not define the rules for setting aside an award.

As mentioned above, by the use of the term 'may' in Article V(1), the requirements of the NYC are not mandatory; the courts can, but are not obliged to, refuse the enforcement of an award based on Article V(1). Moreover, some courts have refused to deny the enforcement of an award, based on more favourable domestic provisions, in accordance with Article VII(1) of the NYC.[67] Consequently, depending on the court in which recognition is sought,[68] an award set aside in one country can be deemed enforceable in another.[69]

AWARD SUSPENDED

The final alternative is where the award has been suspended. This is not defined by the Convention but the majority of courts agree that this notion refers to a decision by a court of the country in which the decision was made[70] ordering the suspension.[71]

ARTICLE V(2)

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> 1. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
> 2. The recognition or enforcement of the award would be contrary to the public policy of that country.

Unlike the grounds for refusal of Article V(1), the grounds of Article V(2) may be raised by the enforcement courts ***ex officio*** (i.e., on their own initiative).[72]

Article V(2)(a) provides that the competent court will first review whether the subject matter is arbitrable according to its own law (i.e., the ***lex fori executionis***).[73] Each country is free to determine which disputes are arbitrable or not (such as, for instance, criminal cases, labour law issues,[74] bankruptcy law-related disputes[75] or divorces[76]), to the extent that those rules do not conflict with the purposes and objectives of the NYC.[77] In particular, there is an understanding between contracting states that it should be possible to settle by arbitration any disputes of which the subject matter is of a commercial nature and thus differences arising out of commercial matters should not be refused enforcement under Article V(2)(a).-[78]

Article V(2)(b) further provides that enforcement and recognition can be refused in the event of any violation of public policy. The notion of public policy is not defined by the NYC, with each contracting state applying its own definitions; however, it is accepted that the notion of public policy refers to the public policy of the contracting state in which the recognition and enforcement is sought[79] and includes both substantive and procedural rules.[80]

In principle, Article V(2)(b) must be applied in exceptional circumstances only, when it is impossible for a country to recognise and enforce an award 'without abandoning the very fundaments on which it is based'.[81] Accordingly, many countries give an international dimension to the notion of public policy and define it narrowly in view of the NYC pro-enforcement principle.[82]

OTHER ENFORCEMENT REGIMES

Ratified by 172 contracting states, the NYC is quasi-universal in its application and thus governs most cases of recognition and enforcement of foreign arbitral awards. However, there are some exceptions to its applicability.

First, there remain a handful of countries (including Chad, the Republic of the Congo, Libya, North Korea, Somalia, South Sudan, Togo and Yemen) that are not contracting states to the NYC. In these countries, recognition and enforcement of arbitral awards is governed by domestic legislation or other applicable (bilateral or multilateral) treaties.

Further, certain contracting states (including China, France, India, Japan, Turkey, the United Kingdom and the United States) have declared, under the reciprocity reservation of Article I(3), that they will apply the NYC only to the recognition and enforcement of awards made in the territory of another contracting state. In these countries, the courts will not apply the NYC to awards made in a non-contracting state; however, there may be other means of enforcement, for instance through bilateral treaties.[83] The practical significance of the reciprocity reservation is continuously diminishing as the number of contracting states increases and as the influence of the UNCITRAL Model Law on International Commercial Arbitration (Articles 35(1) and 36(1) of which provide for recognition and enforcement of an arbitral award 'irrespective of the country in which it was made') grows.[84]

Finally, Article VII(1) of the NYC expressly reserves the application of provisions of a contracting state's domestic laws and other treaties that give parties seeking to enforce a foreign award more favourable rights than under the NYC. The provision mirrors the NYC's purpose of enabling the enforcement of foreign arbitral awards to the greatest extent, thereby enshrining the notion of a 'more favourable right'.[85]

The most relevant multilateral agreements that contain more favourable provisions on the recognition and enforcement of foreign arbitral awards are the European Convention on International Commercial Arbitration of 1961 and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (which establishes the International Centre for Settlement of Investment Disputes (the ICSID Convention)).

Article IX of the European Convention restricts the grounds for refusal resulting from the setting aside of an award in the country of origin to cases in which the award was set aside on specific grounds. Thus, under the European Convention, the setting aside of an arbitral award in a contracting state shall only constitute a ground for refusing recognition or enforcement in another contracting state where (1) the setting aside took place in the state in which, or under the law of which, the award has been made and (2) the award was set aside for specific reasons, corresponding to those mentioned in Paragraphs (a) to (d) of Article V(1) of the NYC.**[86]** Moreover, Article V of the European Convention contains specific provisions on the preclusion of objections.

The recognition and enforcement of awards under the ICSID Convention is much easier than under the NYC. Pursuant to Article 54(1) of the ICSID Convention, each contracting state shall recognise an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations therein 'as if it were a final judgment of a court in that State'. Thus, as long as the formalities set out in Article 54(2) of the ICSID Convention are satisfied, there is no room for refusal of recognition and enforcement of an ICSID award.**[87]**

Endnotes

1 Sébastien Fries, Martin Molina and Annemarie Streuli are partners and Denise Wohlwend is an associate at Kellerhals Carrard. ^ Back to section

2 Marike R P Paulsson, ***The 1958 New York Convention in Action*** (2016), p. 157. ^ Back to section

3 Drawn from Paulsson, op. cit. note 2, pp. 165–66. ^ Back to section

4 Christian Borris and Rudolf Hennecke, in Reinmar Wolff (ed.), ***New York Convention*** (2nd edition, 2019), Article V, para. 21. ^ Back to section

5 Dennis Solomon, in Stephan Balthasar (ed.), ***International Commercial Arbitration*** (2nd edition, 2021), chap B, para. 177. ^ Back to section

6 ibid., chap B, para. 179. ^ Back to section

7 Paulsson, op. cit. note 2, p. 171. ^ Back to section

8 Bernhard Berger and Franz Kellerhals, ***International and Domestic Arbitration in Switzerland*** (4th edition, 2021), paras. 2051 and 2053; Daniel Girsberger and Nathalie Voser, ***International Arbitration: Comparative and Swiss Perspectives*** (4th edition, 2021), p. 533. Back to section

9 Solomon, op. cit. note 5, chap B, para. 177. Back to section

10 Borris and Hennecke, op. cit. note 4, Article V, para. 46 et seq. Back to section

11 Solomon, op. cit. note 5, chap B, para. 187 et seq. Back to section

12 Daniel Girsberger and Nathalie Voser, ***International Arbitration: Comparative and Swiss Perspectives*** (4th edition, 2021), p. 534. Back to section

13 Paulsson, op. cit. note 2, p. 158. According to Article XVI of the NYC, the five language versions shall be equally authentic. The different language versions can be accessed on the United Nations Treaty Collection (UNTC), available at https://treaties.un.org. The English version of Article V(1) reads as follows: 'Recognition and enforcement of the award ***may be refused***.' The French version of the same paragraph states:'La reconnaissance et l'exécution de la sentence ***ne seront refusées***' (emphasis added). Back to section

14 Borris and Hennecke, op. cit. note 4, Article V, paras. 76–77. Back to section

15 Stephan Wilske and Tod J Fox, in Reinmar Wolff (ed.), ***New York Convention*** (2nd edition, 2019), Article V, para. 101. See also New York Convention Guide, Article V(1)(a), paras. 9 and 24; Girsberger and Voser, op. cit. note 12, para. 1703. Back to section

16 Micha Bühler and Michael Cartier, 'Commentary on Article 194 PILS', in Manuel Arroyo (ed.), ***Arbitration in Switzerland – The Practitioner's Guide*** (2nd edition, 2018), para. 45, p. 415. Back to section

17 Wilske and Fox, op. cit. note 15, Article V, paras. 106–07. See also New York Convention Guide, Article V(1)(a), para. 22. See, for another opinion, Gary B Born, ***International Commercial Arbitration*** (3rd edition, 2021), Chapter 26: 'Recognition and enforcement of International Awards' (updated Sep. 2022), para. 4, p. 13. Back to section

18 Bühler and Cartier, op. cit. note 16, para. 46, p. 415. Back to section

19 Girsberger and Voser, op. cit. note 12, para. 1703b. Back to section

20 Berger and Kellerhals, op. cit. note 8, para. 2058, p. 778. Back to section

21 New York Convention Guide, Article V(1)(a), para. 36. Back to section

22 Wilske and Fox, op. cit. note 15, Article V, para. 112. Back to section

23 Born, op. cit. note 17, p. 29. Back to section

24 Wilske and Fox, op. cit. note 15, Article V, para. 115. Back to section

25 Berger and Kellerhals, op. cit. note 8, para. 2060, p. 779. Back to section

26 ibid., para. 2059, p. 779. Back to section

27 New York Convention Guide, Article V(1)(a), para. 42; Girsberger and Voser, op. cit. note 12, para. 17006. Back to section

28 Berger and Kellerhals, op. cit. note 8, para. 2059, p. 779. Back to section

29 Nigel Blackaby, Constantine Partasides, et al., ***Redfern and Hunter on International Arbitration*** (7th edition, OUP, 2022), para. 11.69. Back to section

30 New York Convention Guide, Article V(1)(b), para. 5. Back to section

31 Maxi Scherer, in Reinmar Wolff (ed.), ***New York Convention*** (2nd edition, 2019), Article V, paras. 136 and 139. Back to section

32 It is notably the case for France, Italy, Germany, Spain, Switzerland and the United States. See Berger and Kellerhals, op. cit. note 8, para. 2064, p. 782; Scherer, op. cit. note 31, Article V, para. 139; Girsberger and Voser, op. cit. note 12, para. 1709. Back to section

33 New York Convention Guide, Article V(1)(b), para. 17. Back to section

34 Girsberger and Voser, op. cit. note 12, para. 1709a. Back to section

35 New York Convention Guide, Article V(1)(b), para. 20. Back to section

36 ibid., para. 37. Back to section

37 Scherer, op. cit. note 31, Article V, paras. 136 and 142; Girsberger and Voser, op. cit. note 12, para. 1710. Back to section

38 Wilske and Fox, op. cit. note 15, Article V, para. 136, pp. 147–48. Back to section

39 Borris and Hennecke, op. cit. note 4, Article V, para. 234. Back to section

40 Girsberger and Voser, op. cit. note 12, para. 1714. Back to section

41 *In favorem*: Berger and Kellerhals, op. cit. note 8, para. 2070, p. 784; Born, op. cit. note 17, p. 62. Back to section

42 Borris and Hennecke, op. cit. note 4, Article V, para. 245. Back to section

43 New York Convention Guide, Article V(1)(c), para. 8; ***Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., Gould Marketing, Inc., Hoffman Export Corporation, Gould International, Inc***., US Court of Appeals, Ninth Circuit, 23 Oct. 1989, 88-5879 / 88-5881. Back to section

44 New York Convention Guide, Article V(1)(c), para. 33; Paulsson, op. cit. note 2, Chapter 6: 'Resisting Enforcement of Awards', p. 188. Back to section

45 Borris and Hennecke, op. cit. note 4, Article V, para. 206. Back to section

46 Born, op. cit. note 17, p. 66. Back to section

47 New York Convention Guide, Article V(1)(c), para. 10. Back to section

48 Berger and Kellerhals, op. cit. note 8, para. 2073, p. 784. Back to section

49 Girsberger and Voser, op. cit. note 12, para. 1716b. Back to section

50 New York Convention Guide, Article V(1)(d), para. 33. Back to section

51 Borris and Hennecke, op. cit. note 4, Article V, para. 270. Back to section

52 Girsberger and Voser, op. cit. note 12, para. 17016. Back to section

53 See Borris and Hennecke, op. cit. note 4, Article V, para. 273. Regarding Switzerland, see Berger and Kellerhals, op. cit. note 8, para. 2074, p. 785. Contra, see, Jean-François Poudret and Sébastien Besson, ***Comparative Law of International Arbitration*** (2007), pp. 839–40 or Borris and Hennecke, op. cit. note 4, Article V, para. 272, citing different authors against the total party autonomy. Back to section

54 New York Convention Guide, Article V(1)(d), para. 3. Back to section

55 Berger and Kellerhals, op. cit. note 8, para. 2075, p. 785. Back to section

56 Girsberger and Voser, op. cit. note 12, para. 1716c. Back to section

57 New York Convention Guide, Article V(1)(d), para. 39. Back to section

58 Bühler and Cartier, op. cit. note 16, para. 76, p. 421. Back to section

59 Berger and Kellerhals, op. cit. note 8, para. 2080, p. 786. Back to section

60 New York Convention Guide, Article V(1)(e), para. 7; and Chapter 11, 'Recognition and Enforcement of Arbitral Awards' in Blackaby, Partasides, et al., op. cit. note 29, para. 11.90. Back to section

61 New York Convention Guide, Article V(1)(e), para. 10; Born, op. cit. note 17, para. 4, p. 13; Bühler and Cartier, op. cit. note 16, para. 78, p. 421. ^ Back to section

62 New York Convention Guide, Article V(1)(e), para. 11. ^ Back to section

63 Christoph Liebscher, in Reinmar Wolff (ed.), ***New York Convention*** (2nd edition, 2019), Article V, para. 367 et seq.; New York Convention Guide, Article V(1)(e), para. 15. ^ Back to section

64 Born, op. cit. note 17, p. 86; New York Convention Guide, Article V(1)(e), para. 13. ^ Back to section

65 Chapter 11, 'Recognition and Enforcement of Arbitral Awards' in Blackaby, Partasides, et al., op. cit. note 29, paras. 11.92 and 11.101; Girsberger and Voser, op. cit. note 12, para. 1718b. ^ Back to section

66 Liebscher, op. cit. note 63, Article V, para. 378. ^ Back to section

67 See the following ***Hilmarton Ltd. v. Omnium de Traitement et de Valorisation S.A.*** cases – Court of Appeal, 17 Nov. 1989, in ***XIX Yrbk Com. Arb.***, 1994, pp. 214–19; Federal Tribunal, 17 Apr. 1990, in ***XIX Yrbk Com. Arb.***, 1994, pp. 220–22; Tribunal de Grande Instance, 22 Sep. 1993, in ***XX Yrbk Com. Arb.***, 1995, pp. 194–97; Court of Cassation, 23 Mar. 1994, in ***XX Yrbk Com. Arb.***, 1995, pp. 663–65; Court of Appeal, Versailles, 29 Jun. 1995, in ***XXI Yrbk Com. Arb.***, 1996, pp. 524–31; Court of Cassation, 10 Jun. 1997, in ***XXII Yrbk Com. Arb.***, 1997, pp. 696–98; and the following ***Chromalloy Aeroservices, Inc. v. The Arab Republic of Egypt*** cases – US No. 230, United States District Court, District of Columbia, Civil No. 94–2339 (JLG), 31 Jul. 1996, in ***XXI Yrbk Com. Arb.***, 1996, pp. 1001–12; andFrance No. 26, Court of Appeal of Paris, 14 Jan. 1997, in XXII ***Yrbk Com. Arb.***, 1997, pp. 691–95, cited in Girsberger and Voser, op. cit. note 12, para. 1719. See, also, Chapter 11, 'Recognition and Enforcement of Arbitral Awards' in Blackaby, Partasides, et al., op. cit. note 29, paras. 11.92 and 11.96. ^ Back to section

68 ***Société PT Putrabali Adyamulia v. Société Rena Holding et Société Mnogutia Est Epices***, 2007, ***Rev. Arb.*** 507 cited in Chapter 11, 'Recognition and Enforcement of Arbitral Awards' in Blackaby, Partasides, et al., op. cit. note 29, para. 11.97 or ***République démocratique populaire Laos v. société Thai-Lao Lignite Co., Ltd.***, Court of Appeal of Paris, 19 Feb. 2013, in ***Rev. Arb.*** 1/201, pp. 299–300; see, also, ***Corporacion Mexicana de Mantenimiento Integral S. de R.L de C.V. v. Pemex Exploracion y Produccion***, SDNY, 27 Aug. 2013, cited in Chapter 11, 'Recognition and Enforcement of Arbitral Awards' in Blackaby, Partasides, et al., op. cit. note 29, para. 11.96; ***Yukos Capital SARL v. The Russian Federation***, Amsterdam Court of Appeal, 2009, p. 703 ff cited in Caspar Feest, 'Enforcement of Awards set aside at the seat of Arbitration', in ***SAA – Swiss Arbitration Academy***, Vol. 4 (2018), para. 81. ^ Back to section

69 Chapter 11, 'Recognition and Enforcement of Arbitral Awards' in Blackaby, Partasides, et al., op. cit. note 29, para. 11.96; New York Convention Guide, Article V(1)(e), para. 28. ^ Back to section

70 Liebscher, op. cit. note 63, Article V, para. 403. Back to section

71 New York Convention Guide, Article V(1)(e), para. 31. Back to section

72 Bühler and Cartier, op. cit. note 16, para. 87, p. 42 and para. 12, p. 1374. Back to section

73 New York Convention Guide, Article V(2)(a), para. 14; Blackaby, Partasides, et al., op. cit. note 29, para. 11.107. Back to section

74 New York Convention Guide, Article V(2)(a), para. 26. Back to section

75 ibid., para. 28. Back to section

76 Girsberger and Voser, op. cit. note 12, para. 1726, p. 550. Back to section

77 David Quinke, in Reinmar Wolff (ed.), ***New York Convention*** (2nd edition, 2019), Article V, para. 441. Back to section

78 New York Convention Guide, Article V(2)(a), para. 21. Back to section

79 Blackaby, Partasides, et al., op. cit. note 29, paras. 11.110 and 11.114; Berger and Kellerhals, op. cit. note 8, para. 2094, p. 792; Nivedita C Shenoy, 'Public Policy under Article V (2) (b) of the New York Convention: Is there a transnational standard?', ***Cardozo Journal of Conflict Resolution***, XX (2018), p. 82. Back to section

80 Girsberger and Voser, op. cit. note 12, para. 1730, p. 552. Back to section

81 New York Convention Guide, Article V(2)(b), para. 4. Back to section

82 Blackaby, Partasides, et al., op. cit. note 29, para. 11.112. See also, for instance, 'Switzerland', Berger and Kellerhals, op. cit. note 8, para. 2097, p. 793; Shenoy, op. cit. note 79, p. 101; Girsberger and Voser, op. cit. note 12, para. 1729, p. 551; Bühler and Cartier, op. cit. note 16, para. 91, p. 424. Back to section

83 Bernd Ehle, in Reinmar Wolff (ed.), ***New York Convention*** (2nd edition, 2019), Article I, para. 170. Back to section

84 ibid., Article I, para. 173; see, also, Article 194 of the Swiss Private International Law Act, which provides that the 'recognition and enforcement of foreign arbitral awards [regardless of their origin] is governed by the New York Convention'. Back to section

85 Quinke, op. cit. note 77, Article VII, para. 5. Back to section

86 ibid., para. 88. Back to section

87 ibid., para. 92. Back to section

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